

# VAP Environmental Covenants Guidance

***May 2005 Guidance:  
Developing Proposed Environmental Covenants with “Activity and Use  
Limitations” for Properties under Ohio’s Voluntary Action Program***

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## Overview

This guidance applies to property cleanups under Ohio’s Voluntary Action Program (VAP), when the volunteer requests a VAP certified professional (CP) to submit to Ohio EPA a no further action (NFA) letter with a request for a covenant not to sue. An NFA letter submitted with covenant not to sue request is an “environmental response project” that is subject to Ohio’s new Uniform Environmental Covenants law. See Ohio Revised Code (ORC) 5301.80 to 5301.92 (effective December 30, 2004).

If the property’s remedy relies on “activity and use limitations” (formerly known as use restrictions) to restrict property use, the volunteer must provide to the CP a “proposed environmental covenant” that complies with ORC 5301.82. The proposed environmental covenant - with its activity and use limitations - is a remedy to support the CP’s issuance of an NFA letter. See ORC 3746.10(C)(3)(b) and 3746.11(A) (as revised effective December 30, 2004).

This guidance provides volunteers and CPs with language for development of proposed environmental covenants in coordination with the ***Environmental Covenant Template*** - an Ohio EPA template for use with all agency environmental response projects. If you have questions regarding the template or this guidance, please contact Ohio EPA’s Legal Office at 614-644-3037 and ask for a VAP attorney.

## Background Section of Environmental Covenant

Using a “whereas clause” format for the background section, identify the volunteer and the property owner, identify the VAP cleanup, identify the property that is the subject of the voluntary action as compared to the environmental covenant, describe the purpose of the activity and use limitations, and explain where the reader can find more information about the voluntary action with focus on the NFA letter’s executive summary. Some of the information blanks would remain blank until the agency’s review of the proposed environmental covenant, for example, Ohio EPA’s assigned NFA tracking number.

As a general rule, the property legal description used for the proposed environmental covenant should match the property legal description and acreage set forth in the NFA letter. However, if an activity and use limitation will cover a smaller property area than

the (entire) voluntary action property, be sure to overview the property differences in the background section.

### ***Example Language for Background Section***

WHEREAS, [*Name and address of Volunteer*] has undertaken a voluntary action with respect to the Property described herein under Ohio's Voluntary Action Program ("VAP"), pursuant to Ohio Revised Code ("ORC") Chapter 3746 and Ohio Administrative Code ("OAC") Chapter 3745-300;

WHEREAS, the Property is owned by [*name(s) of Owner or Owners*]; [*Name of Volunteer*] is not an owner of the Property;

WHEREAS, the voluntary action remedy for the Property includes the activity and use limitations set forth in this Environmental Covenant. Certified Professional [*CP name, CP No.*] issued a no further action letter for the Property on [*date*] ("NFA Letter") and on [*date*] submitted the NFA Letter to Ohio EPA, with a request for a covenant not to sue ("No. [*\_\_NFA\_\_*]");

WHEREAS, the activity and use limitations support the issuance of the NFA Letter and a covenant not to sue for the Property; the limitations protect against exposure to the [*hazardous substances / petroleum / hazardous substances and petroleum*] in [*soil / ground water / soil and ground water, or describe other affected media*] on or underlying the Property;

WHEREAS, the NFA Letter's executive summary contains an overview of the voluntary action. The executive summary may be reviewed as an exhibit to the covenant not to sue issued for the Property, recorded in the deed records for the Property in the [*name of county*] County Recorder's Office. You may also review the covenant not to sue, executive summary, and NFA Letter (No. [*\_\_NFA\_\_*]) by contacting Records Management Officer, Ohio EPA, Division of Emergency and Remedial Response, P.O. Box 1049, Columbus, OH 43216-1049, 614-644-2924, or [*name*] District Office at [*address and phone*], or [*reference the CP's or Volunteer's business name, business address and phone*]; ...

### **Activity and Use Limitations - Property Evaluation**

Determine the appropriate type and language for the property's activity and use limitations ("limitations") as part of the Phase II Property Assessment and the determination of applicable standards in accordance with OAC 3745-300-07(D)(5) and 3745-300-15. Each limitation must be considered on a property-specific basis to determine which limitation or combination of limitations is suitable for the particular circumstances of the property.

The possible limitations may vary based on the type of:

- complete exposure pathways (existing and reasonably-anticipated pathways determined pursuant to OAC 3745-300-07(D)(2)),
- affected media,
- receptors, and
- VAP standards applicable to the property.

When a limitation is established allowing for land uses in the alternative, such as commercial or industrial land use, the property must meet the *more restrictive* of the standards for each chemical of concern. For example, for the petroleum constituents in soil and ground water the property would achieve the standards established under OAC 3745-300-08(B)(3)(a) (referring to the State Fire Marshal, Bureau of Underground Storage Tank Regulations' generic standards) plus VAP standards for the industrial land use under that rule.

The example *Limitation for Commercial or Industrial Land Uses*, below, would address the category of commercial and industrial land uses as defined in OAC 3745-300-08(B). The generic limitation language applies to remedies and applicable standards relying on the exposure assumptions used to calculate the VAP generic numerical standards for commercial and industrial land use ("generic exposure assumptions").<sup>1</sup> Further, the generic limitation applies when the remedy relies on a property-specific risk assessment that employs the generic exposure assumptions.

The generic *Limitation for Commercial or Industrial Land Uses* would not be appropriate for some property scenarios. Working from OAC 3745-300-07(D)(5), consider the needed limitations in the determination of the applicable standards that may rely on the institutional controls (now activity and use limitations). For a property-specific risk assessment performed with modified exposure assumptions that rely on limitations to support a modified factor assumption pursuant to OAC 3745-300-09(D), the generic language would be inappropriate for the property.

The volunteer needs to propose specific limitation language that takes into account the property-specific modified exposure assumptions. The proposed limitation should be enforceable and based on a modified exposure assumption that is technically-supported by the NFA letter. For more guidance, please refer to OAC 3745-300-15(D)(3) (criteria for institutional controls), and OAC 3745-300-13(D) and (E) (criteria for sufficient, necessary information for CP to issue an NFA letter).

The example *Limitation Prohibiting Ground Water Extraction and Use*, below, may be used for most property scenarios to restrict against any extraction or use of ground water for potable and non potable exposures. If, however, a reasonably-anticipated

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<sup>1</sup>The generic exposure assumptions for commercial and industrial land use are set forth in the comments following OAC 3745-300-08(B)(2)(c)(ii) and (B)(2)(c)(iii). The actual exposure factor point values and distributions are set forth in the Support Document for the Development of Generic Numerical Standards and Risk Assessment Procedures (revised February 2002), which can be downloaded from the VAP web page or a copy can be requested by calling 614-644-2924.

land use includes extraction or use of the ground water for nonpotable scenarios - such as incidental contact during excavation activities, dewatering of shallow ground water during construction, or extraction for industrial cooling - the language may be adjusted to address the property-specific needs. Standards for the nonpotable ground water use would need to be developed under a property-specific risk assessment in accordance with OAC 3745-300-09 to evaluate the potential exposure risks for the allowable non-potable uses. Further, the allowed non-potable uses should be specified in the limitation; the example below includes alternative language for use as applicable.

Use of example limitation language does not guarantee a property complies with VAP rules or applicable standards. The example language is intended only as guidance for the development of acceptable limitations.

### ***Example Language for Generic Limitations***

***Limitation for Commercial or Industrial Land Uses.*** The Property is hereby limited to commercial or industrial land use only, as defined in OAC 3745-300-08(B)(2)(c)(ii) and (B)(2)(c)(iii) (effective October 21, 2002).

OAC 3745-300-08(B)(2)(c)(ii) defines *commercial land use* as “land use with potential exposure of adult workers during a business day and potential exposure of adults and children who are customers, patrons, or visitors to commercial facilities during the business day. Commercial land use has potential exposure of adults to dermal contact with soil, inhalation of vapors and particles from soil and ingestion of soil. Examples of commercial land uses include but are not limited to warehouses; building supply facilities; retail gasoline stations; automobile service stations; automobile dealerships; retail warehouses; repair and service establishments for appliances and other goods; professional offices; bank and credit unions; office buildings; retail businesses selling foods or merchandise; golf courses; hospitals and clinics; religious institutions; hotels; motels; and parking facilities.”

OAC 3745-300-08(B)(2)(c)(iii) defines *industrial land use* as “land use with potential exposure of adult workers during a business day and potential exposures of adults and children who are visitors to industrial facilities during the business day. Industrial land use has potential exposure of adults to dermal contact with soil, inhalation of vapors and particles from soil and ingestion of soil.

Examples of industrial land uses include, but are not limited to: lumberyards; power plants; manufacturing facilities such as metalworking shops, plating shops, blast furnaces, coke plants, oil refineries, brick factories, chemical plants and plastic plants; assembly plants; non-public airport areas; limited access highways; railroad switching yards; and marine port facilities.”

***Limitation Prohibiting Ground Water Extraction and Use.*** Ground water underlying the Property shall not be extracted or used for any purpose, potable or otherwise, except for investigation, monitoring or remediation of the ground water *[Additional language for certain property-specific complete exposure pathways, which if addressed in the NFA letter may be excluded from the generic limitation: or in conjunction with construction or excavation activities or maintenance of subsurface utilities].*